Petition

81-954

No.

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IN THE

Supreme Court of the United States

FIRST PENTECOSTAL CHURCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Whether enforcement of an Internal Revenue Service Summons issued to the Grayson County State Bank for the production of church records of the Petitioner violates the First Amendment right to religious freedom of the members of Petitioner.

2. Whether Section 7605(c) of the Internal Revenue Code of 1954 precludes enforcement of the Summons.

LIST OF PARTIES IN COURT BELOW

1. United States of America, Plaintiff-Appellant

2. Grayson County State Bank and Lloyd Butts, Defendants-Appellees

3. First Pentecostal Church of Sherman, Texas, Intervenor-Appellee

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IN THE

Supreme Court of the United States

No.

FIRST PENTECOSTAL CHURCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, FIRST PENTECOSTAL CHURCH OF SHERMAN, TEXAS, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding September 21, 1981.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, styled *United States v. Grayson County State Bank,* et al, not yet reported, appears in the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTORY PROVISIONS INVOLVED

TITLE 26, UNITED STATES CODE § 7605(c)

(c) Restriction on examination of churches. — No examination of the books of account of a church or convention or association of churches shall be made to determine whether such organization may be engaged in the carrying on of an unrelated trade or business or may be otherwise engaged in activities which may be subject to tax under part III of subchapter F of chapter 1 of this title (sec. 511 and following, relating to taxation of business income of exempt organizations) unless the Secretary (such officer being no lower than a principal internal revenue officer for an internal revenue region) believes that such organization may be so engaged and so notifies the organization in advance of the examination. No examination of the religious activities of such an organization shall be made except to the extent necessary to determine whether such organization is a church or a convention or association of churches, and no examination of the books of account of such an organization shall be made other than to the extent

necessary to determine the amount of tax imposed by this title.

STATEMENT OF THE CASE

In early 1978 the Internal Revenue Service (IRS) initiated a joint civil and criminal investigation into the tax liability of Rev. Charles E. Glass, the Minister of Petitioner, for the tax years 1973, 1974, 1975, and 1976. On November 30, 1978, in furtherance of this investigation, IRS Special Agent Paul Jones caused a Summons to be issued to the Grayson County State Bank for the production by the Bank of records relating to Petitioner for the years in question with respect to which records Rev. Glass had signature privileges and/or trustee assignment. The Bank, which has had a working relationship with Petitioner for over twenty-two years, refused, at Petitioner's request, to produce the records.

Subsequently on May 18, 1980, the IRS sought judicial enforcement of the Summons by filing an Application for an Order to Show Cause in the United States District Court for the Eastern District of Texas. Jurisdiction was predicated on Title 26, United States Code § 7604. The District Court granted Petitioner's Motion to Intervene, and on June 23, 1980, a hearing to Show Cause was held.

The evidence presented by the United States at this hearing attempted to establish that the investigation was being conducted for a legitimate purpose, that the inquiry was relevant to that purpose, that the records sought were not in the IRS's possession, and that the proper administrative steps had been followed.

The evidence also revealed that early in the investigation Rev. Glass, upon request by the IRS agents, voluntarily

produced for inspection all of his personal financial records for the years in question. Rev. Glass declined, however, to produce various financial records of Petitioner which had also been requested. In subsequent weeks the IRS agents contacted approximately ten to twelve members of Petitioner at various times for purposes of, among other things, obtaining these records. The failure of these efforts resulted in the issuance of the Summons.

On July 8, 1980 the District Court entered an Order denying enforcement of the Summons. On September 21, 1981, the United States Court of Appeals for the Fifth Circuit vacated that Order and remanded this cause for further proceedings. A Motion to Stay the Issuance of the Mandate was denied.

REASONS FOR GRANTING THE WRIT

I

ENFORCEMENT OF THE SUMMONS WOULD VIOLATE PETITIONER'S FIRST AMENDMENT RIGHTS

In *United States v. Powell,* 379 U.S. 48 (1964), this Court established the requirements that the IRS must meet in order to show that a Summons was issued in good faith, and to establish a prima facie case for enforcement of that Summons. Once these requirements have been met, the burden shifts to the taxpayer to show that enforcement would be an abuse of the Court's process. Should the taxpayer meet the burden of raising "a substantial question that judicial enforcement of the Administrative Summons would be an abusive use of the Court's process," the burden would then shift back to the government to show probable cause to suspect fraud on the part of the taxpayer. *Id.* at 51, 57-58.

The Fifth Circuit held that the IRS met their initial burden of establishing a prima facie case for enforcement of the Summons by showing a valid purpose for the Summons, the relevance of the inquiry, noting that the Summons was adequately narrow in scope, that the IRS was not in possession of this information, and that the proper administrative steps had been followed. The Fifth Circuit further stated that these facts were "undisputed."

The Fifth Circuit holding is in error. Petitioner has continuously disputed the evidence related to the purpose of the Summons, as well as the relevance of the inquiry. As the District Court appropriately noted in its Order denying enforcement, the Summons requests documents which would lay open to government examination Petitioner's entire financial history for the years in question, including the manner in which Petitioner raises, invests, and spends its funds.[1] The Summons covers every category of record

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[1]The Summons requested the bank to produce the following:

The following records on (or on behalf of) the First Pentecostal Church, 601 N. Harrison, Sherman, Texas for the years 1973, 1974, 1975, and 1976 on which CHARLES E. GLASS has signature privileges and/or trustee assignment

* * *

1. Signature cards.

2. Bank statements for the period beginning January 1, 1973 through January 31, 1977.

3. Cancelled checks, (sic).

4. Deposit slips.

5. Savings statements for periods beginning January 1, 1973 through January 31, 1977.

6. Savings deposit slips.

7. Savings withdrawal slips.

8. Certificates of Deposit in the name of the First

a bank would normally maintain relating to its customers. Such an extensive examination into Petitioner's financial records is not necessary to investigate the correct tax liability of it's minister.

Furthermore, the Summons is clearly not properly limited in scope. The Summons requests numerous documents totally unrelated to Rev. Glass' income, such as deposit slips, loan applications, and Certificates of Deposit in Petitioner's name.[2] The Fifth Circuit, therefore, has erred in holding that a prima facie case for enforcement of the Summons was established.

In addition, the evidence does establish, as the District Court held, that enforcement of the Summons would be a burden on the free exercise of the religious beliefs of Petitioner's members. This burden is demonstrated in two ways. The far reaching scope of the Summons itself is clearly an excessive and unnecessary interference by the IRS into Petitioner's internal financial matters. Secondly, the undisputed evidence introduced at the hearing to show cause revealed that the IRS agents involved made numerous and repeated attempts to gain access to this information, as well as any other information they could obtain regarding Petitioner's internal financial matters, by questioning members of Petitioner, former members of Petitioner, and members of the community having had

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Pentecostal Church, Sherman, Texas in effect and/or purchased during 1973, 1974, 1975, and/or 1976.

9. Loan applications.

10. Loan ledger sheets.

[2]Petitioner suggests that an example of a Summons properly narrowed so as to be relevant as well as issued for a valid purpose would simply request "all cancelled checks on which Rev. Glass is the payee."

financial transactions with Petitioner. This repeated questioning was irrelevant, far beyond the scope of their investigation, extremely embarrassing to Petitioner and its members, and certainly created a "chilling effect" on Petitioner's membership.

As the District Court held, the burden demonstrated above raises a "substantial question that judicial enforcement of the Summons would be an abusive use of the court's process, requiring that the IRS come forward and show some reason justifying its request and not just rely on its usual right to conduct a 'fishing' expedition into the affairs of the taxpayer." (App. pg. 18a). The issues raised by this Summons involve substantial and valuable First Amendment rights. This important question of constitutional law has not been settled by this Court; therefore, review by this Court is appropriate and necessary.

II

THE IRS IS LIMITED IN ITS EXAMINATION OF PETITIONER'S RECORDS TO ONLY THOSE AUTHORIZED BY SECTION 7605(c) OF THE INTERNAL REVENUE CODE OF 1954

The First Amendment proscribes unnecessary or excessive interference by the government into the internal financial matters of a religious organization. Section 7605(c) of the Internal Revenue Code of 1954 establishes one narrow exception to this general prohibition. Section 7605(c) provides that no examination of the books of account of a church shall be made to determine the church's unrelated income tax liability unless the church receives written notice of such an audit in advance. As the District Court held, the IRS is therefore limited in its attempts to

obtain and examine church records to only those examinations made pursuant to Section 7605(c).[3]

The summons involved in the instant case, however, was *not* issued pursuant to an investigation authorized by Section 7605(c). The First Amendment, therefore, prohibits this attempt by the IRS to interfere with Petitioner's internal financial matters.

Furthermore, the phrase "books of account" does encompass the bank records sought to be examined. The Fifth Circuit's reliance by analogy on cases interpreting the same phrase as it is used in Section 7605(b) is misplaced. Section 7605(b) deals with the examination of the books of account of a *private taxpayer,* not of a church. The various cases cited by the Fifth Circuit have held that a private taxpayer's "books of account" do not include the records of a third party. In so holding, these Courts have relied primarily on the fact that the protections afforded a private taxpayer by the Fourth and Fifth Amendments do not extend to third party records.

Petitioner, however, is not relying on the Fourth and Fifth Amendments, but rather the First Amendment,

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[3]In so holding, the District Court noted the following excerpt from the Senate Conference Report concerning the enactment of this Section:

> The bill contains several administrative provisions including one providing that no audit of a church, its integrated auxiliaries, or a convention or association of churches is to be made unless the principal internal revenue officer for the region believes the church may be engaged in a taxable activity and notifies the church in advance of the examination. This provision is intended to protect churches from unnecessary tax audits in the interest of not interfering with the internal financial matters of churches.

Pub. L. 91-172, Title 1, § 121(f) (Dec. 30, 1969), U.S. Code Cong. & Ad. News 2097 (1969).

which protects an entirely different set of interests than the Fourth and Fifth Amendments. The private taxpayer dealt with in Section 7605(b) does not enjoy the same First Amendment protection against unnecessary government interference into his or her internal financial matters as does Petitioner.

Moreover, it is the compelled disclosure of the information contained in the records sought which constitutes unnecessary and excessive government interference, not the physical task of conducting the examination. The information contained in the bank records is identical to that contained in Petitioner's personal books of account. The First Amendment protection that Petitioner has from an examination of its own records should extend to and include the bank records in question. The Fifth Circuit's holding that Petitioner's "books of account" does not include bank records substantially undermines any church's First Amendment protection in that the IRS would be able to investigate any internal financial matter of a church by simply issuing a Summons to that church's bank. In that event, a church desiring to preserve its First Amendment rights would be forced to not use banks. Additionally, this holding effectively renders § 7605(c) meaningless in that the IRS would be able to completely circumvent the express language and purpose of § 7605(c) by simply issuing a Summons to the church's bank for the records needed.

It has been held that there is a protectible interest in bank records where an infringement of First Amendment rights has been shown. *United States v. Citizens Bank,* 612 F.2d 1091 (8th Cir. 1980). The issues raised in this cause involve important questions of Federal Constitutional and statutory law; therefore review by this Court is both appropriate and necessary.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

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APPENDIX A

UNITED STATES of America
Plaintiff-Appellant,

v.

GRAYSON COUNTY STATE BANK
and Lloyd Butts,
Defendants-Appellees,

First Pentecostal Church, Etc.,
Intervenor-Appellee.

No. 80-1892.

United States Court of Appeals,
Fifth Circuit.
Unit A

Sept. 21, 1981

Appeal from the United States District Court for the Eastern District of Texas.

Before CHARLES CLARK, TATE and SAM D. JOHNSON, Circuit Judges:

TATE, Circuit Judge:

The United States appeals from an order denying judicial enforcement, see 26 U.S.C. § 7604(b), of an Internal Revenue Service (IRS) administrative summons previously issued, see 26 U.S.C. § 7602, to the Grayson County State Bank, which had failed to respond. By the summons, in connection with the investigation of the tax liability of an individual taxpayer (the minister of the

church), the IRS sought production of certain bank records pertaining to a church, as to which the taxpayer (the minister) had signature privileges or trustee assignment. Having permitted the church to intervene, the district court granted its motion to quash the summons. In so doing, the district court held: (1) granting the IRS the discovery of bank records so sought would impair the free exercise of religion by laying open to governmental examination the church's financial history; and (2) that 26 U.S.C. § 7605(c), which restricts IRS examination of "the books of account of a *church,*" applied so as to restrict the IRS examination of the *bank* records of a church. The government appeals, contending that the district court erred in both holdings. We agree and, therefore, reverse.

Factual Context

Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. § 7602, grants the Internal Revenue Service the power to summon books and records, and to take the testimony of any individual for the purposes, *inter alia,* of ascertaining the correctness of a tax return and determining a taxpayer's correct tax liability. Section 7604 of the Code, 26 U.S.C. § 7604 grants authority to the federal district courts to issue orders compelling, through their powers of contempt, compliance with the IRS summonses.

Pursuant to Section 7602, the IRS in November 1978 issued a summons to Grayson County State Bank in connection with an ongoing investigation into the income tax liability of the minister of the First Pentecostal Church in Sherman, Texas for the years 1973, 1974, 1975, and 1976. The taxpayer had produced his personal financial records, but he refused to produce certain church records requested by the IRS. Officials of the church also refused to allow revenue agents to inspect any church records. The Grayson County State Bank through Lloyd Butts was

ordered to appear before an IRS special agent to give testimony and produce certain specified taxpayer-related books and records "on (or on behalf of) the First Pentecostal Church, 601 N. Harrison, Sherman, Texas for the years 1973, 1974, 1975, and 1976 on which [the minister-taxpayer] has signature privileges and/or trustee assignment (See attachment)."[1]

On refusal of the bank to provide said records the IRS applied to the federal district court for enforcement of the administrative summons under Section 7604. A motion to intervene as defendant was granted to the First Pentecostal Church which filed a motion to quash the summons as constituting excessive governmental interference or entanglement with church affairs and because its enforcement would allegedly have a "chilling effect" on the free exercise of religion by church members.

The district court, as earlier noted, denied judicial enforcement of the IRS summons and quashed the summons on the grounds that (1) it violates the First Amendment

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[1]The records subject to the taxpayer-minister's signature privilege or trustee assignment specified by the attachment to the summons were:

1. Signature cards.

2. Bank Statements for the period beginning January 1, 1973 through January 31, 1977.

3. Cancelled checks, [*sic*].

4. Deposit slips.

5. Savings statements for periods beginning January 1, 1973 through January 31, 1977.

6. Savings deposit slips.

7. Savings withdrawal slips.

8. Certificates of Deposit in the name of the First Pentecostal Church, Sherman, Texas in effect and/or purchased during 1973, 1974, 1975, and/or 1976.

free exercise of religion rights of the intervening church and (2) that the summons was not an authorized examination of *church* records because it was not conducted pursuant to 26 U.S.C. § 7605(c),[2] a provision restricting examination of such records.

I. The First Amendment Issue

In denying the IRS's application for enforcement and quashing the summons, the district court found that the summons in this case sought documents which would "lay open to government examination the entire financial history – including the manner in which the Church raises, invests, and spends funds – from all accounts that the Church's minister has signature privileges or trustee assignment" and that such disclosure would be a "burden upon the free exercise of the religious belief of [the church's] members." The District court found this clearly

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[2]26 U.S.C. § 7605 TIME AND PLACE OF EXAMINATION

* * * * *

(c) *Restriction on examination of churches.* – No examination of the books of account of a church or convention or association of churches shall be made to determine whether such organization may be engaged in the carrying on of an unrelated trade or business or may be otherwise engaged in activities which may be subject to tax under part III of subchapter F of chapter 1 of this title (sec. 511 and following, relating to taxation of business income of exempt organizations) unless the Secretary (such officer being no lower than a principal internal revenue officer for an internal revenue region) believes that such organization may be so engaged and so notifies the organization in advance of the examination. No examination of the religious activities of such an organization shall be made except to the extent necessary to determine whether such organization is a church or a convention or association of churches, and no examination of the books of account of such an organization shall be made other than to the extent necessary to determine the amount of tax imposed by this title. [as added by § 121(f), Tax Reform Act of 1969, Pub.L. No. 91-172, 83 Stat. 487].

raised a substantial question that judicial enforcement of the summons would be an abusive use of the court's process that thus required the IRS to show some reason to justify its request. The court further found that, since civil tax liability for the years had prescribed, the government must come forward and show some interest by way of tax fraud, which it had not done; in this respect, the court pointed out that the government had produced no showing of probable cause to suspect that the minister had committed tax fraud.

[1-3] The legal principles applicable are not in substantial dispute. In enforcement of an IRS summons under Section 7602 when the summons authority is necessary for "the effective performance of congressionally imposed responsibilities to enforce the tax code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies." *United States v. Euge,* 444 U.S. 707, 711, 100 S.Ct. 874, 878, 63 L.Ed.2d 141 (1980). "A defense against disclosure based upon religious objections can find First Amendment support only if the disclosure either serves to establish religion or impedes the free exercise of sectarian conviction. U.S. Const. Amend. 1. Government action can violate the establishment clause . . . if the end result is an excessive entanglement with religion." *United States v. Holmes,* 614 F.2d 985, 989 (5th. Cir. 1980).[3] Free exercise of religion embraces two concepts: (1) freedom to believe, which is absolute; and (2) freedom to act, which conduct, however, is subject to regulation for the protection of society. *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). (As the district court recog-

[3]The district court noted that although the church's objection was couched partially in "establishment clause" language, the claim was in essence grounded in the free exercise clause and was treated as such.

nized, the present issue might arise only under the second concept, as the church and its members are unimpeded in their beliefs.)

[4] Initially, the issuance of an IRS summons must meet a test of good faith as formulated in *United States v. Powell,* 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). The IRS must show that: (1) the investigation will be conducted pursuant to a legitimate purpose, (2) the inquiry may be relevant to the purpose, (3) the information sought is not already within the IRS's possession, and (4) the proper administrative steps have been followed. *Powell, supra,* 379 U.S. at 57-58, 85 S.Ct. at 255; *United States v. Holmes, supra,* 614 F.2d at 987-88.

[5] Appellee's argument that the IRS did not meet the *Powell* test is easily rejected: A valid purpose was established, namely, to investigate the correct tax liability of the minister; the records sought were limited only to those "on which [the taxpayer had] signature privileges and/or trustee assignment" for the applicable years, indicating relevance of the inquiry; the church has not claimed that the IRS is in possession of this information; and notice of the summons was provided to the taxpayer and the church as required by 26 U.S.C. § 7609 (1976).[4]

[6, 7] Once a prima facie for enforcement is shown, the burden shifts to the taxpayer to show enforcement would be an abuse of the court's process. *Powell, supra,* 379 U.S. at 58, 85 S.Ct. at 255; *Holmes, supra,* 614 F.2d at 988.

> As the Supreme Court held in *Powell,* the Government need make no showing of probable

[4]The church argues that the notice required by § 7605(c) was not given. As we hold § 7605(c) not applicable to this summons, appellee's claim is not pertinent.

> cause to suspect fraud unless the taxpayer raises a substantial question that judicial enforcement of the administrative summons would be an abusive use of the court's process, predicated on more than the fact of re-examination and the running of the statute of limitations in ordinary tax liability.

379 U.S. at 51, 85 S.Ct. at 251.

The church, citing *United States v. Citizens State Bank*, 612 F.2d 1091 (8th Cir. 1980), contends that the enforcement of the summons would result in a "chilling effect" upon the free exercise of the religious beliefs of its members. In *Citizens State Bank* the government issued a summons to the bank requesting *all* bank records relating to the accounts of the taxpayer in question and of the organization of which he was president. The Eighth Circuit found that the appellants met their initial burden by making a prima facie showing of an arguable First Amendment infringement. *Id.* at 1094. In the instant case, the church's reliance on *Citizens State Bank* misplaced. The organization there in question was "a voluntary association of citizens who were opposed to the current operation of the IRS and who made efforts to bring about changes in the United States taxation system." *Id.* at 1093. The conclusion that an IRS summons of this organization's records would produce a "chilling effect" on membership is readily apparent.[5] However, allowing

[5]Here the IRS summons was limited to (1) specified types of documents, (2) on which the taxpayer-minister had signature privilege, (3) for a restricted time span. Compare the broad scope of documents requested by the summons directed to the church itself in *Holmes*, 614 F.2d at 987 n.3, and by the summons in *Citizens State Bank*, 612 F.2d at 1093 n.3. Furthermore, the court in *Citizens State Bank* indicated a more limited summons would be enforceable, emphasizing that "our decision will only rarely serve to limit the reach of an IRS summons." *Id.* at 1094.

the IRS access to information to determine the correct tax liability of the taxpayer, the church's minister, does not restrict the church's freedom to espouse religious doctrine nor to solicit members or support. *United States v. Holmes,* 614 F.2d at 989. Furthermore, the church has presented no evidence that enforcement of this summons would restrict the religious activities of its members.[6]

Further, even if the enforcement would place an indirect burden on some First Amendment rights, we recognized in *United States v. Holmes:*

> The Supreme Court has employed a two part balancing test in determining when such conduct is protected by the free exercise clause. First, plaintiff must show a burden on the exercise of his religion by the law under review. Second, the burden will be upheld only if the government interest outweighs the degree of impairment of free exercise rights. *See Wisconsin v. Yoder,* 406 U.S. 205, 214, 92 S.Ct. 1526, 1532, 32 L.Ed.2d 15 (1972); *Sherbert v. Verner,* 374 U.S. 398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963).

614 F.2d at 989.

We have recognized that compliance with a properly narrowed summons may result in "only an incidental burden upon [the] free exercise of religion," *U.S. v. Holmes,* 614 F.2d at 989; *Hearde v. Commissioner,* 421 F.2d 846 (9th Cir. 1970), and that "[b]alanced against the

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[6]Additionally the order of the district court recognized in footnote that "[u]nlike the Church in *Holmes,* this Church has no option to limit IRS access to church records by foregoing its tax-exempt status since the records are not requested under a § 7605(c) examination of the Church."

incidental burden on church religious activities is the substantial government interest in maintaining the integrity of its fiscal policies . . . This interest is sufficiently compelling to justify any incidental infringement of plaintiff's First Amendment rights." *Holmes,* 614 F.2d at 990.

We therefore disagree with the district court's conclusion that First Amendment rights of the church or its members were implicated by the issuance of the present summons. The summons was issued to secure access to records in the possession of a bank, in connection with a taxpayer investigation, to examine those records of the bank pertaining to the church that were relevantly connected with the taxpayer's financial activity for the tax years of the investigation. Under the relevant facts, no substantial showing is made of abusive use of the summons, for its issuance does not constitute any significant burden upon the free exercise of religious activity by the church or its members.

[8] The appellee church nevertheless contends that the district court's conclusions to such effect are factual findings and subject to displacement on appellate review only if clearly erroneous, Fed.R.Civ.P. 52(a). However, it is well settled that the clearly-erroneous limitation does not apply to the review of a district court's legal conclusions and inferences drawn from the facts, and that the appellate court is free to make an independent determination from the same facts of the determinative legal conclusions and inferences. *United States v. Mississippi Valley Generating Company,* 364 U.S. 520, 526, 81 S.Ct. 294, 297, 5 L.Ed.2d 268 (1961); *Spray-Bilt, Inc. v. Ingersoll-Rand World Trade, Ltd.,* 350 F.2d 99, 103 (5th Cir. 1965); 9 Wright & Miller, Federal Practice and Procedure, § 2588 at 750, § 2589 at 753 (1971). (Here, the principal facts rele-

vant to our determination are undisputed – the issuance, scope, and purpose of the summons.)

II. The Section 7605(c) Issue

[9] The second issue presented on appeal is whether the court below erred in holding that the IRS, in its attempt to obtain and examine bank records pertaining to the church, is limited to an examination under Section 7605(c) of the Internal Revenue Code, 26 U.S.C. § 7605(c).[7] The IRS correctly contends that § 7605(c) is not applicable in the examination of such bank records.

Section 7605(c) contains two limitations. The first requires that no examination of the "books of account of a *church*" shall be made *to determine whether* such organization *is engaged in the carrying on of an unrelated trade or business or may be otherwise engaged in* "taxable activities"[8] unless the IRS gives the church written notice of such audit; the second limitation requires that such examination must be restricted to the extent necessary to determine the amount of tax imposed upon an unrelated business activity of the church. Paragraph (c) was added to Section 7605 by the Tax Reform Act of 1969[9] as an administrative provision in connection with an amendment to Section 511 of the Code, which made the unrelated business income tax provisions of the Code applicable to

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[7]See text of 26 U.S.C. § 7605(c) at note 2.

[8]Churches are generally exempt from income taxes; however, 26 U.S.C. § 511, 512, provide for tax on the unrelated business income of charitable organizations, including churches.

[9]Section 7605(c) was added by Sec. 121(f), Tax Reform Act of 1969, Pub.L. No. 91-172, 83 Stat. 487 (1969).

churches.[10] The purpose of Section 7605(c) was to protect churches from the administrative burden of "unnecessary tax audits" so as not to interfere with the internal financial matters of the church.[11] This section, therefore, imposes some restriction, but it does not preclude examination of church records.

Here, however, the summons sought to be enforced by the IRS is directed at records of the Grayson County State Bank, not at books of account of the First Pentecostal Church.

In interpreting paragraph (b) of Section 7605,[12] which prohibits a second inspection of a taxpayer's records ab-

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[10]Section 511 was amended by Sec. 121(a), Pub.L. No. 91-172, 83 Stat. 536 (1969).

[11]The Senate Finance Committee, concerning the extension of unrelated business tax to churches, stated

> The bill contains several administrative provisions including one providing that no audit of a church, its integrated auxiliaries, or a convention or association of churches is to be made unless the principal internal revenue officer for the region believes the church may be engaged in a taxable activity and notifies the church in advance of the examination. This provision is intended to protect churches from unnecessary tax audits in the interest of not interfering with the internal financial matters of churches.

S.Rep. No. 91-552, 91st Cong., 1st Sess. *reprinted in* [1969] U.S.Code Cong. & Ad.News 2027, 2097.

[12]U.S.C. § 7605(b).

> (b) *Restrictions on examination of taxpayer.* —
> No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

sent written notice to the taxpayer, the courts have narrowly construed the analogous language "taxpayer's books of account". The courts have consistently found that Section 7605(b) is a limitation upon the examination of a taxpayer's *"books of account"* and "does not apply to an examination of books of account of a third person." *Geurkink v. United States,* 354 F.2d 629, 631 (7th Cir. 1965); *Hall v. Commissioner of Internal Revenue,* 406 F.2d 706, 710 (5th Cir. 1969). *See also: United States v. Krilich,* 470 F.2d 341, 350 (7th Cir. 1972), *cert. den.* 411 U.S. 938, 93 S.Ct. 1897, 36 L.Ed.2d 399 (1973); *Hinchcliff v. Clarke,* 371 F.2d 697, 700 (6th Cir.) *cert. den.* 387 U.S. 941, 87 S.Ct. 2073, 18 L.Ed.2d 1327 (1967); *United States v. Howard,* 360 F.2d 373, 380 (3rd Cir. 1966); *Bouschor v. United States,* 316 F.2d 451, 457 (8th Cir. 1963); *Application of Magnus,* 299 F.2d 335, 336 (2d Cir.), *cert. den.* 370 U.S. 918, 82 S.Ct. 1556, 8 L.Ed.2d 499 (1962). "This prohibition applies by its express terms only to the *taxpayers'* records; it did not prevent the appellants from seeking information from other sources, such as the bank, regarding the taxpayers' possible liability." *DeMasters v. Arend,* 313 F.2d 79, 86 (9th Cir. 1963); "the statutory restriction against second examinations applies only to the taxpayer's own records, and not to records of third parties like the Bank." *United States v. Chemical Bank,* 593 F2d 451, 458 (2d Cir. 1979).

In the instant case the IRS investigation is being conducted in order to determine the correct tax liability of the taxpayer-minister, not to determine whether the church is engaged in unrelated, taxable activities. Under consistent judicial interpretations of comparable provisions, the records sought by the IRS are not books of account of the church. Therefore, Section 7605(c) is not applicable and does not preclude enforcement of the summons against the present bank records pertaining to the church.

CONCLUSION

Accordingly, we find the district court's order denying judicial enforcement of the administrative summons issued to the Grayson County State Bank must be VACATED and REMANDED for further proceedings in accordance with this opinion.

VACATED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

UNITED STATES OF AMERICA
Plaintiff

vs.

GRAYSON COUNTY STATE BANK
and LLOYD BUTTS,
Defendants

and

FIRST PENTECOSTAL CHURCH,
Intervenor

CIVIL ACTION
No. S-80-36-CA

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF
TEXAS
JULY 8, 1980
MURRAY L. HARRIS,
CLERK
BY DEPUTY
/s/

JUDGMENT

On this day came on for consideration the above styled and numbered Cause and for the reasons on file herein, it is ORDERED, ADJUDGED and DECREED that the Application of the United States for the enforcement of an Internal Revenue Service summons dated November 30, 1978, is denied.

It is further ORDERED, ADJUDGED and DECREED that the Intervenor's Motion to Quash said summons is granted.

DONE and ORDERED this 7th day of July, 1980.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	No.
	)	S-80-36-CA
GRAYSON COUNTY STATE BANK and LLOYD BUTTS,	)	FILED U.S. DISTRICT COURT EASTERN DISTRICT OF TEXAS
	)	
FIRST PENTECOSTAL CHURCH, Intervenor	)	JULY 8, 1980 MURRAY L. HARRIS, CLERK BY DEPUTY /s/

ORDER

On June 23, 1980, the above styled and numbered cause came on for hearing on the application of the United States of America, pursuant to 26 U.S.C. § 7604 to enforce an Internal Revenue Service (IRS) summons against Charles E. Glass, dated November 30, 1978, and a Motion to Quash the summons filed by the Intervenor, First Pentecostal Church of Sherman, Texas (hereinafter Church). The Court, having heard the evidence and having reviewed the pleadings and briefs of the parties, is of the opinion that the summons issued against the Defendants and objected to by the Church should be denied enforcement.

The summons under consideration requests bank records on (or on behalf of) the First Pentecostal Church of Sherman, Texas, on which Charles E. Glass has signature privileges or trustee assignment. Charles E. Glass, the taxpayer under investigation, is the minister of the First Pentecostal Church of Sherman.

The Church has objected to the enforcement of the summons on the grounds that it constitutes an excessive governmental interference or entanglement with church affairs and that its enforcement will have a "chilling" effect on the free exercise of religion by its members. It is clear that compelled disclosure, in itself, can seriously impinge on First Amendment rights, *see, Buckley* v. *Valeo,* 424 U.S. 1, 64 (1976) (right of association and belief), and that IRS summons of bank records can raise these First Amendment issues, *see, United States* v. *Citizens State Bank,* 612 F.2d 1091 (8th Cir. 1980) (summons of bank records could violate First Amendment rights of association). Further, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Wisconsin* v. *Yoder,* 406 U.S. 205, 220 (1972); *Surinach* v. *Pesquera de Busquets,* 604 F.2d 73 (1st Cir. 1979).

"A defense against disclosure based upon religious objections can find First Amendment support only if the disclosure either serves to establish religion or impedes the free exercise of sectarian conviction." *United States* v. *Holmes,* 614 F.2d 985, 989 (5th Cir. 1980). Although the Church has objected that disclosure would be an "excessive entanglement," a catch phrase under the establishment clause, claims such as the Church's are treated as in essence being claims that the government summons is an unwarranted invasion of internal church affairs and as such is grounded in the free exercise clause and not the establishment clause. *Id.*

The free exercise clause embraces two concepts — freedom to believe and freedom to act; the first is absolute, the second is subject to regulation for the protection of society. *Cantwell* v. *Connecticut,* 310 U.S. 296

(1940). The issue here comes under the second concept both because it involves conduct and because the Church and its members are unimpeded in their beliefs. *United States* v. *Holmes,* 614 F.2d at 989.

The interests on both sides which the Court must balance in determining if the First Amendment rights of the Church preclude discovery by the IRS are weighty.[1] The summons in this case seeks documents which would lay open to government examination the entire financial history – including the manner in which the Church raises, invests, and spends funds – from all accounts that the Church's minister has signature privileges or trustee assignment, either by himself or in conjunction with other members. The Court must balance the degree which such a disclosure would impair the free exercise of religion against the substantial government interest in maintaining the integrity of its fiscal policies. *See, United States* v. *Holmes,* 614 F.2d at 990.

In balancing these weighty interests, the Court notes that the IRS put on no evidence indicating that the IRS had probable cause to suspect that Charles Glass had committed tax fraud, for which there is no statute of limitations, and that the statute of limitations for ordinary tax liability has run. The Court is aware that under the teaching of *United States* v. *Powell,* 379 U.S. 48 (1964), the IRS need not make such a showing until a substantial question is raised that the judicial enforcement of the administrative summons would be an abusive use of the

[1]Unlike the Church in *Holmes,* this Church has no option to limit IRS access to church records by foregoing its tax-exempt status since the records are not requested under a § 7605(c) examination of the Church.

Court's process. *Id.* at 51. However, the Church has shown that enforcement of the summons will be a burden upon the free exercise of the religious beliefs of its members. Clearly this raised a substantial question that judicial enforcement of the summons would be an abusive use of the Court's process, requiring that the IRS come forward and show some reason justifying its request and not just rely on its usual right to conduct a "fishing" expedition into the affairs of the taxpayer. *See, United States* v. *Luther,* 481 F.2d 429, 432 (9th Cir. 1973) (section 7602 authorizes the IRS to engage in a fishing expedition).

As an additional basis for the denial of judicial enforcement of the summons, the Court is of the opinion that the IRS is limited in its attempts to obtain and examine church records to an examination under 26 U.S.C. § 7605(c). The legislative history of § 7605(c) indicates that Congress was aware of the burden on the exercise of religious beliefs that IRS examinations of church records caused and enacted that section in order to limit such an examination to that which is necessary to determine the tax-exempt status of the Church. As noted in the Senate Conference Report concerning the enactment of this section:

> The bill contains several administrative provisions including one providing that no audit of a church, its integrated auxiliaries, or a convention or association of churches is to be made unless the principal internal revenue officer for the region believes the church may be engaged in a taxable activity and notifies the church in advance of the examination. This provision is intended to protect churches from unnecessary tax audits in the interest of not interfering with the internal financial matters of churches.

Pub. L. 91-172, Title 1, § 121(f) (Dec. 30, 1969), U.S. Code Cong. & Ad. News 2097 (1969).

For the above reasons, the Court finds that the administrative summons violates the free exercise of religion under the First Amendment and further that the summons is not an authorized examination since it is not conducted pursuant to 26 U.S.C. § 7605(c). Therefore, judicial enforcement of the summons is DENIED.

This Order constitutes the findings of fact and conclusions of law of the Court.

SIGNED this 7th day of July, 1980.

UNITED STATES DISTRICT JUDGE

Opposition

Office-Supreme Court, U.S.
FILED
DEC 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-954

In the Supreme Court of the United States

OCTOBER TERM, 1981

FIRST PENTECOSTAL CHURCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-954

FIRST PENTECOSTAL CHURCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the order of the court of appeals enforcing an internal revenue summons over petitioner's objection that the summons would violate the First Amendment associational rights of church members and that the summons was issued in violation of Section 7605(c) of the Internal Revenue Code of 1954 (26 U.S.C.).

The pertinent facts may be summarized as follows. On November 30, 1978, F. Paul Jones, a special agent of the Internal Revenue Service, issued a summons to the Grayson County State Bank seeking certain bank records relating to accounts of petitioner First Pentecostal Church over which the minister of the Church, Charles E. Glass, had signatory

authority or a trustee assignment.[1] The summons was issued in aid of an investigation into Glass' personal income tax liability for the tax years 1973 through 1976.

Upon the bank's refusal to provide the requested information, the United States and Special Agent Jones brought this action in the United States District Court for the Eastern District of Texas. Petitioners intervened in the proceeding and moved to quash the summons on the grounds, *inter alia*, that enforcement would violate the First Amendment associational rights of its members and that the summons was issued in violation of Section 7605(c) of the Code. After an evidentiary hearing, the district court entered an order denying enforcement and granting the Church's motion to quash (Pet. App. 14a).

The district court concluded that because the requested information would disclose to the Internal Revenue Service information about the financial activities of petitioner, enforcement would "be a burden upon the free exercise of the religious beliefs of [the Church's] members." The court held that such a burden could not be imposed absent a showing by the government of probable cause to believe that Glass had committed tax fraud. The court further held that the summons should not be enforced because Section 7605(c) of the Code limits examinations of church records by the Internal Revenue Service to those necessary to "determine the tax-exempt status of the Church" (Pet. App. 17a-19a).

The court of appeals reversed. It held that petitioner had failed to demonstrate that compliance with the summons would impose a significant burden upon the constitutional

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[1]The summoned records included signature cards, bank statements, cancelled checks, deposit slips, savings statements, savings deposit and withdrawal slips, certificates of deposit, loan applications and loan ledger sheets.

rights of its members. The court further held that the restrictions of Section 7605(c) of the Code were not applicable here because the summons sought only bank records and not the "books of account of a church" as contemplated by the statute (Pet. App. 1a-13a).

1. The court of appeals correctly held that petitioner failed to demonstrate that the mere examination of the requested information by the Internal Revenue Service would impose a cognizable burden on the First Amendment rights of its members. In issuing the summons in question, the government does not seek to regulate the internal financial affairs of petitioner or the religious activities of petitioner's members. The summons was issued for the proper and strictly secular purpose of ascertaining Glass' correct tax liability. The summons in no way interferes with petitioner's members' right to embrace the religious doctrine of their choice. The mere possibility (Pet. 6-7) that petitioner's members or potential members might find the inquiry "embarrassing" falls far short of the type of objective threat which reasonably might be expected to have a serious adverse impact on petitioner's ability to pursue its religious goals. See *Buckley* v. *Valeo*, 424 U.S. 1, 69-72 (1976); *Laird* v. *Tatum*, 408 U.S. 1, 8-16 (1972); *United States* v. *Freedom Church*, 613 F. 2d 316, 320 (1st Cir. 1979); *In re Grand Jury Proceedings Witness Bardier*, 486 F. Supp. 1203, 1210-1211 (D. Nev. 1980). Compare *NAACP* v. *Alabama*, 357 U.S. 449 (1958).[2]

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[2]Nor does petitioner's claim (Pet. 5-6) that the summons is overbroad demonstrate the existence of a burden upon the constitutional right of its members to the free exercise of their religion. Petitioner has not and can not make a claim that production of these records for examination will be unduly burdensome or will disrupt the operation of its internal affairs. The records requested are those of the Grayson County State

At all events, even if disclosure of the bank records of the bank's transactions with petitioner could be found to place some incidental burden on the First Amendment rights of petitioner's members, that small burden is fully justified by the Government's strong interest in determining Glass' correct income tax liability. *Bob Jones University* v. *Simon*, 416 U.S. 725, 746-747 (1974); *United States* v. *Holmes*, 614 F. 2d 985, 989-990 (5th Cir. 1980); *United States* v. *Freedom Church, supra.* See *United States* v. *Citizens State Bank*, 612 F. 2d 1091 (8th Cir. 1980).

2. The court of appeals likewise correctly rejected petitioner's claims that enforcement of the summons is barred by Section 7605(c) of the Code. Section 7605(c) contains two limitations. The first requires that no examination of the "books of account of a church" shall be made to determine whether such organization is engaged in the carrying on of an unrelated trade or business or may be otherwise engaged in taxable activities unless the principal IRS officer gives the church written notice of such audit. The second limitation requires that such examination must be restricted to the extent necessary to determine the amount of tax imposed upon an unrelated business. As the court below

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Bank and the production of the records will impose no administrative burden whatsoever on petitioner or its members.

Moreover, the scope of the summons is well within the Service's statutory authority under 26 U.S.C. 7602. It is clear that all of the financial information requested "may be relevant" to the determination of Glass' income tax liability. See Section 7602 of the Internal Revenue Code of 1954. See also *United States* v. *City National Bank & Trust Co.*, 642 F. 2d 388 (10th Cir. 1981); *United States* v. *Wyatt*, 637 F. 2d 293 (5th Cir. 1981); *United States* v. *National Bank of South Dakota*, 622 F. 2d 365 (8th Cir. 1980). There is no basis for petitioner's claim (Pet. 6 n.2) that " 'all cancelled checks on which Rev. Glass is the payee' " would supply a sufficient basis for an accurate determination of his tax liability. It is sufficient that the records sought " 'might [throw] light upon' the correctness of the taxpayer's returns." *United States* v. *National Bank of South Dakota, supra*, 622 F. 2d at 367.

properly noted (Pet. App. 11a), the purpose of Section 7605(c) is to protect churches from the administrative burden of unnecessary audits, and thus the applicability of the statute is limited by its own terms to the "books of account of a church." As we have noted (pages 3-4, note 2, *supra*), the administrative burden here is on the bank, not on the church.

The courts have consistently held that the analogous provisions of Section 7605(b) of the Code—which prohibit "unnecessary" examination of the "books of account" of a taxpayer—apply only to examinations of a taxpayer's own books and records, and do not apply to examinations of the records of a third party such as a bank or an employer. *Geurkink* v. *United States*, 354 F. 2d 629, 631 (7th Cir. 1965); *Hall* v. *Commissioner*, 406 F. 2d 706, 710 (5th Cir. 1969). See also: *United States* v. *Krilich*, 470 F. 2d 341, 350 (7th Cir. 1972), cert. denied, 411 U.S. 938 (1973); *Hinchcliff* v. *Clarke*, 371 F. 2d 697, 700 (6th Cir.), cert. denied, 387 U.S. 941 (1967); *United States* v. *Howard*, 360 F. 2d 373, 380 (3d Cir. 1966); *Bouschor* v. *United States*, 316 F. 2d 451, 457 (8th Cir. 1963); *In re Magnus*, 299 F. 2d 335, 336 (2d Cir.), cert. denied, 370 U.S. 918 (1962). See *De Masters* v. *Arend*, 313 F. 2d 79, 86 (9th Cir. 1963); *United States* v. *Chemical Bank*, 593 F. 2d 451, 458 (2d Cir. 1979). After examining the judicial interpretations of this comparable provision of the Code, the court of appeals refused to impose the restrictive gloss upon Sections 7605(c) urged by petitioner. As in the case of Section 7605(b), the provisions of Section 7605(c) need not be applied to bank records to implement the intent of that statute. The decision below therefore properly declined to extend the reach of the statute to the bank records here. See *United States* v. *Euge*, 444 U.S. 707, 711 (1980).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1981

DOJ-1981-12